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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

TECHNICAL SERGEANT WINCHESTER ROBINSON, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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October 2003

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QUESTIONS PRESENTED

I. Whether the good-faith exception to the Fourth Amendment exclusionary rule should extend to a police officer's own faulty conclusion based on a mistake of law that he had probable cause to make a traffic stop.

II. Whether an automobile's sudden turn in an urban area with public housing and high crime is enough to create a reasonable suspicion that criminal activity is afoot to justify an investigative stop.

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The petitioner, Technical Sergeant Winchester Robinson, Jr., respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in this case.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Robinson*, 58 M.J. 429 (2003), is located at Appendix A, 1a-37a. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Robinson*, 56 M.J. 541 (A.F. Ct. Crim. App. 2001), is located at Appendix B, 38a-59a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on July 8, 2003.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

On October 8, 1999, the petitioner was tried and convicted by a general court-martial for assault, using and possessing cocaine, and failure to obey military orders. At a

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[1] Appendix A, p. 1a.

preliminary session, the petitioner moved to suppress evidence of his use and possession of cocaine, discovered as a result of a traffic stop and ensuing searches of the petitioner and his vehicle. After the trial judge denied the motion, the petitioner conditionally pled guilty to using and possessing cocaine, thereby preserving for appellate review the correctness of the trial judge's ruling.

During the preliminary session, Officer Mark Jennewein of the Melbourne, Florida, police department testified that, on February 27, 1999, he was on patrol in a fully marked police car in the city of Melbourne in a public housing area known for its high crime. While patrolling at about 1:00 a.m., he noticed a maroon four-door Oldsmobile parked "at" the residence of a known drug dealer.[2] The Oldsmobile had a military decal on the windshield. The officer checked the car's registration and discovered it was registered to a person who lived at Patrick Air Force Base, Florida, six miles south of Melbourne. The officer waited several minutes but left when he did not see anyone come out to the car from the house.

About thirty minutes later, Officer Jennewein parked at a vacant liquor store in a nearby area of town with a high crime rate. He saw the same Oldsmobile drive by that he had seen earlier that morning. The officer immediately pulled out and drove behind the Oldsmobile. Within two to three seconds, the Oldsmobile braked and turned suddenly into an alley without using a turn signal. Officer Jennewein

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[2] Officer Jennewein was not clear about where the car was actually parked in relation to the residence. He testified at various times that the car was "in front of," "at Steele [St.] and Mathers," "at [IL]'s," "over at [IL]'s," "at a house," and "right next to his house in his dirt driveway or dirt lot." The trial judge found simply that the car was parked "outside" a known drug dealer's house.

conducted a traffic stop. He testified that he made the stop *solely because of the failure to use a turn signal.* (R. 76).

After making the stop, the officer had a drug dog sniff around the car. The dog alerted at the driver's door. Based on this alert, Officer Jennewein searched the Oldsmobile and found a small white rock-like object and other paraphernalia, which field-tested positive for cocaine. He placed the petitioner under arrest.

In his motion to suppress, the petitioner relied upon *State v. Riley*, 638 So. 2d 507, 508 (Fla. 1994), a decision of the Florida Supreme Court holding that the failure to use a turn signal is not an offense under Florida law when the turn does not affect other vehicles.[3]

Officer Jennewein testified that the Oldsmobile's turn did not cause him to brake, veer, or otherwise affect his or any other vehicle. The officer testified, however, that a study showed that drivers of vehicles that fail to signal when turning are impaired about 40 percent of the time. The officer testified that he did not see any other indicia of impairment prior to the stop. He did not state that he made the stop because he believed the petitioner was impaired.

In denying the motion to suppress, the trial judge concluded that Officer Jennewein had both probable cause to believe a traffic violation had occurred and reasonable suspicion to believe that the petitioner was impaired. The

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[3] Fla. Stat. ch. 316.155(1) (1999) states: "No person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, *in the event any other vehicle may be affected by the movement.*" (emphasis added).

trial judge did not make any conclusions about whether the officer otherwise reasonably suspected criminal activity and the prosecutor did not advance any such theory in opposing the motion.[4]

On appeal, a divided Air Force Court of Criminal Appeals disagreed with the trial judge's conclusion that the police officer had probable cause to make a stop for the traffic infraction but upheld the stop because "a reasonable officer aware of these facts would have a lawful basis for a brief investigative stop." Appendix B, p. 51a. When the petitioner appealed further, the United States Court of Appeals for the Armed Forces affirmed the decision of the Air Force Court of Criminal Appeals in a 2-1-2 decision. Two judges—Judges Gierke and Effron—held that Officer Jennewein had reasonable suspicion to make the stop because an objective review of the record supported a finding that the sudden turn was "(1) evasive, (2) an indicator of impaired driving, and (3) unusual because it was a sudden turn onto an unpaved alley that was not a customary roadway." Appendix A, p. 10a. Chief Judge Crawford in a concurring opinion admitted that it was "a close question" whether Officer Jennewein had reasonable grounds to justify the stop but stated she would affirm because Officer Jennewein "had a *good faith belief* that he had a legally justifiable reasonable suspicion to stop [the petitioner's] motor vehicle." Appendix A, p. 12a (emphasis added).

Two judges dissented. Judge Baker dissented because the record did not support the factual conclusions that the petitioner had parked "at" the drug dealer's home or that he

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[4] In oral argument, the prosecutor disputed the defense's assertion that the police officer would have made the stop without observing the traffic infraction and he argued that the other indicia of suspicion arose after the stop. (R. 157).

had driven in an impaired manner or that an objective review of the record could support a finding of reasonable suspicion to justify the stop. Appendix A, pp. 19a, 21a-22a. Judge Erdmann dissented also because he did not agree that an appellate court could supply the justification for an investigative stop on grounds of reasonable suspicion when the officer's articulated reason for the stop was a mistaken belief that the petitioner had violated a traffic law. Appendix A, p. 31a.

REASONS FOR GRANTING THE WRIT

This case presents two questions about the Fourth Amendment's reach over the largest area of discretionary police power and potential abuse: the investigative stop. Because these questions are of fundamental importance to the administration of criminal justice, they should be examined by the Court. In submitting the questions, the petitioner does not challenge the duration of the stop or the events after the stop that led to the cocaine's seizure.

The first question concerns whether the good-faith exception to the exclusionary rule applies to a police officer's reliance on his own mistaken understanding of the law. The question arises because Chief Judge Crawford's concurring opinion—an opinion essential to the decision of the U.S. Court of Appeals for the Armed Forces—did apply such an exception to this case. This Court, however, has previously declined the invitation to recognize a good-faith exception for an officer who erroneously believes he is acting within the scope of a statute. *Illinois v. Krull*, 480 U.S. 340, 360 n. 17 (1987) (otherwise recognizing a good-faith exception when the officer reasonably relies on a statute and acts within the scope of the statute, though the statute is later held to be unconstitutional). Because Chief Judge Crawford's concurring opinion extended the good-faith exception to evidence obtained by an officer who acted

outside the law, the Court is presented with its first real occasion to examine the policies of the exclusionary rule as they relate to such evidence.[5]

This Court should also examine this question because the basic rationale of Chief Judge Crawford's concurring opinion challenges this Court's Fourth Amendment jurisprudence from *Terry v. Ohio*, 392 U.S. 1 (1968), to *Whren v. United States*, 517 U.S. 806 (1996). In *Terry*, this Court declared that the reasonableness of a particular search and seizure must be objectively evaluated in light of the facts available to the officer at the moment of the search and seizure. *Terry*, 392 at 21-22. This Court expressly rejected "simple good faith on the part of the arresting officer" as not enough, because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)). Similarly, this Court in *Whren* stated that its recent case law foreclosed "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813. Chief Judge Crawford's view, however, is that a police officer's subjective intent could make *otherwise illegal conduct* legal or constitutional. Because her view

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[5] Chief Judge Crawford relied on *United States v. Leon*, 468 U.S. 897 (1984), in her concurring opinion. Appendix A, pp. 15a-16a. In *Leon*, this Court recognized a good-faith exception to the exclusionary rule for evidence seized by a police officer in good faith reliance on a warrant that was subsequently held to be defective. The Court stated that the exclusionary rule was intended to deter police lawlessness, not the errors of judges and magistrates. *Leon*, 468 U.S. at 916. The present case, however, concerns the judgment of a law enforcement officer acting on his own and not that of a magistrate.

goes contrary to this Court's declared principles, this Court should grant review of the first question to resolve the inconsistency.

Finally, this Court should examine the first question in order to resolve the conflict among three courts of appeal. Two circuit courts of appeal have taken a position contrary to that of Chief Judge Crawford's. The Fifth Circuit in *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999), refused to apply a good-faith exception to the exclusionary rule for drugs seized after a stop was made merely because an officer honestly believed that a traffic infraction had been committed. *But see United States v. Ramirez-Lujan*, 976 F.2d 930 (5th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) (upholding the admission of evidence because the border patrol agent had a good faith belief that the defendant was attempting to avoid a checkpoint). Similarly, the Ninth Circuit in *United States v. Mariscal*, 285 F.3d 1127 (9th Cir. 2002), held that an officer's mistaken view of the law in making a stop cannot be made reasonable when the objective facts do not support a finding that a traffic violation had occurred. This Court should grant review of the first question to resolve the conflict between the courts of appeal and to settle whether a police officer's subjective belief can cure an otherwise illegal stop.

The second question asks whether an automobile's quick turn in a high crime area can constitute reasonable suspicion to justify an investigative stop. The question addresses the police's unfettered freedom to infringe on the rights of citizens who live in and traverse areas with high crime rates. Officer Jennewein's conduct in this case—a willingness to act on nothing more substantial than a hunch—is precisely the type of indiscriminate harassment and police lawlessness

that many Americans frequently complain of.[6] As Justice Jackson succinctly stated in *Brinegar v. United States*: "I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. *Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.*" 338 U.S. 160, 181 (1949) (dissenting opinion) (emphasis supplied). Without the protection of the Fourth Amendment exclusionary rule, "the liberty of every man [will be] in the hands of every petty officer." *Illinois v. Krull*, 480 U.S. at 363 (O'Connor, J., dissenting) (quoting James Otis's argument to the royal Superior Court in Boston in 1761 against the ancient Act of Parliament authorizing indiscriminate general searches by writs of assistance). Few issues are more important to American society than the amount of power it permits its police to use without effective control by law. This Court should grant review of the second question to clarify the scope of the Fourth Amendment's proscription against arbitrary investigative stops by police officers and to "usefully add to the body of law on the subject." *Ornelas v. United States*, 517 U.S. 690 (1996).

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[6] This is especially true of African-Americans. *See* Jean Johnson, *Americans' Views on Crime and Law Enforcement: Survey Findings*, National Institute of Justice Journal 233 (Sept. 1997) (reporting a study by the Joint Center for Political and Economic Studies in April 1996, which found that 43% of African-Americans consider "police brutality and harassment of African-Americans a serious problem" in their own community).

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

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October 2003

Appendix A

UNITED STATES, Appellee

v.

Winchester ROBINSON, JR., Technical Sergeant
U.S. Air Force, Appellant

No. 02-0148

Crim. App. No. 33925

United States Court of Appeals for the Armed Forces

Argued November 13, 2002

Decided July 8, 2003

GIERKE, J., delivered the judgment of the Court, in which EFFRON, J., joined. CRAWFORD, C.J., filed a separate opinion concurring in the result. BAKER and ERDMANN, JJ., each filed a separate dissenting opinion.

Counsel

For Appellant: *Major Jefferson B. Brown (argued); Lieutenant Colonel Beverly B. Knott and Major Jeffrey A. Vires (on brief); Lieutenant Colonel Timothy W. Murphy and Major Terry L. McElyea.*

For Appellee: *Captain Matthew J. Mulbarger (argued); Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Christa S. Cothrel (on brief); Lieutenant Colonel LeEllen Coacher.*

Military Judge: *Barbara G. Brand*

Judge GIERKE delivered the judgment of the Court.

A general court-martial convicted the Appellant, pursuant to his pleas, of failure to obey a lawful order, possessing cocaine, using cocaine, and assault, in violation of Articles 92, 112a, and 128, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 912a, and 928, respectively. Appellant's pleas of guilty to possession and use of cocaine were conditional pleas, entered in accordance with Rule for Courts-Martial 910(a)(2). The adjudged sentence, imposed by a panel of officer and enlisted members, provides for a bad-conduct discharge, confinement for six months, and reduction to pay grade E-4. The convening authority approved the sentence but waived automatic forfeitures. The Court of Criminal Appeals affirmed the findings and sentence. *United States v. Robinson*, 56 M.J. 541 (A.F. Ct. Crim. App. 2001).

This Court granted review of the following issue:[1]

> WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS ALL EVIDENCE OBTAINED AS THE RESULT OF AN UNLAWFUL STOP AND SUBSEQUENT SEARCH OF APPELLANT'S AUTOMOBILE.

For the reasons set out below, we affirm the decision of the Court of Criminal Appeals.

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[1] We heard oral argument in this case at the Washington & Lee University School of Law, Lexington, Virginia, on November 13, 2002, as part of "Project Outreach." *See United States v. Mahoney*, 58 M.J. 346 n.1 (2003).

Background

At the time of the offenses, the Appellant was assigned to the 45th Communications Squadron at Patrick Air Force Base (AFB), Florida. He was a Technical Sergeant (E-6) with approximately 19 years of active duty.

On the evening of February 27, 1999, Officer Mark Jennewein, a member of the Melbourne, Florida Police Department, was working the night shift on routine patrol. Before joining the Melbourne Police Department, Officer Jannewein had been an Air Force security policeman for over five years. His last military assignment was at Patrick AFB. Melbourne is about six miles from Patrick AFB.

Officer Jennewein was patrolling a high-crime area, known for its drug and prostitution activity, in a marked police cruiser. He was engaged in "a prostitution and drug interdiction." At about 1:00 a.m., he noticed a maroon four-door Oldsmobile parked "right next to [a well-known drug dealer's] house in his dirt driveway or dirt lot." His computer check of the license plate number revealed that the registered owner lived at 95-B Virginia. Officer Jennewein saw a sticker on the vehicle that identified the registered owner as a noncommissioned officer assigned to Patrick AFB. Officer Jennewein observed the car for another 10 or 15 minutes and then was called away for other duties.

Officer Jennewein continued his patrol and later parked his car behind a vacant liquor store in another high drug and prostitution area. Shortly thereafter, he saw the same maroon Oldsmobile traveling on the roadway. As soon as Officer Jennewein's marked police cruiser pulled out behind the Appellant's vehicle, the Appellant quickly made a right turn, without signaling, into an unpaved alley next to an apartment complex. The sudden turn did not cause Officer Jennewein to brake suddenly or swerve. Officer Jennewein testified that failure to signal a turn is an indicator of impaired driving. He decided to stop Appellant's vehicle when it made the sudden

turn without signaling. He activated his red and blue lights and made a traffic stop at approximately 1:30 a.m.

Officer Jennewein approached the Oldsmobile and asked the Appellant to produce his driver's license, vehicle registration, and proof of insurance. Appellant fumbled with his wallet and was able to present his driver's license, but he was not able to find his registration and proof of insurance. Officer Jennewein told him to keep looking for the other documents.

There was a passenger in the Appellant's car, who was "rough" looking, with tattered clothing, and somewhat emaciated, "like a street person." The passenger had no identification, but said he lived in the neighborhood and that his name was Floyd Simmons. Mr. Simmons said he knew the Appellant because they had worked together for the last six months as concrete block masons. Officer Jennewein checked for outstanding warrants against Mr. Simmons, determined that there were none, and allowed him to leave. Officer Jennewein asked the Appellant how he knew Mr. Simmons, and Appellant indicated they had just met.

After about 10 minutes, the Appellant found his registration and proof of insurance. Meanwhile, Officer Duffy arrived in her patrol car as a backup, having heard Officer Jennewein report the traffic stop on the police radio. Officer Jennewein noticed that the address on the Appellant's registration did not match the address on his driver's license.

Officer Jennewein requested a computer check for outstanding warrants against the Appellant. He was told to wait because of another request ahead of him. While waiting for a response, he began writing a ticket for failing to update the address on the driver's license. He gave Appellant a "verbal" warning for failing to signal his turn.

Officer Jennewein asked Appellant if he had any drugs or weapons in his car, and Appellant said he did not. Officer Jennewein then asked him to consent to a search of his

vehicle. When Appellant declined, Officer Jennewein requested that a canine unit be sent to the scene.

Officer Jennewein asked Appellant about the military sticker on his vehicle, and Appellant responded that he was in the military. Officer Duffy asked Appellant for his military identification, and Appellant complied. Officer Jennewein then noticed that the date of birth on Appellant's military identification card was different from the date of birth on his driver's license. Appellant said that the Department of Motor Vehicles had made a mistake and would not allow him to correct it.

While conversing with Appellant, Officer Jennewein noticed an odor of alcohol coming from Appellant's person. Appellant's speech seemed somewhat "mumbled" and his eyes were watery and bloodshot.

Officer Jennewein was still writing the citation for the out-of-date address on the driver's license and still waiting for the computer check on Appellant when the canine unit arrived at approximately 1:48 a.m. Officer Jennewein asked Officer Gary Markowski, the canine officer, to walk the canine around the car. When Officer Markowski asked Appellant to move back to avoid interfering with the canine, he noticed that Appellant "seemed to be a bit slow in his actions," and "seemed to be sluggish with his speech and his movements[.]"

Officer Jennewein advised Appellant that he suspected him of driving under the influence of alcohol, and he asked him to submit to a field sobriety exercise. Appellant refused. Meanwhile, the canine alerted on Appellant's vehicle. Officer Jennewein advised Appellant that he was being detained upon probable cause that he had a narcotic substance in his car. Appellant was handcuffed and placed in the patrol car.

Officers Jennewein and Markowski searched Appellant's vehicle and found rock cocaine and drug paraphernalia. Officer Jennewein then informed Appellant he was under

arrest for possession of cocaine as well as driving under the influence of alcohol. Officer Jennewein testified that he would have arrested Appellant and searched his car even if the canine had not alerted.

At trial, Appellant moved to suppress "any and all evidence, including but not limited to cocaine, urine and blood tests and results, observations of the police officers, and military [identification] card obtained as the result of the unlawful seizure of the accused and resulting search of his vehicle[.]" The defense argued that there was no probable cause and "no justifiable or legal reasons for the stop" of Appellant's vehicle, because the turn without signaling did not violate Florida law. The defense further argued that the stop was "unreasonably extended" to conduct a canine search of the vehicle.

Officer Jennewein did not specifically mention Florida law in his testimony. He referred to the failure to signal as an indicator of impaired driving and as a "traffic infraction." The only references to Florida law were in the defense's written motion to suppress and in oral argument on the motion.

The military judge made extensive findings of fact that comported with the uncontested testimony of Officers Jennewein and Markowski. Among these findings of fact, the military judge found, "Officer Jennewein initiated a traffic stop based upon the failure to properly signal." The military judge ruled that Officer Jennewein had probable cause to stop Appellant for a traffic violation when Appellant braked suddenly and turned without signaling; that, after making the traffic stop and observing Appellant, Officer Jennewein had a reasonable suspicion that Appellant was impaired; that the alert by the canine provided probable cause to search the vehicle; and that the cocaine and paraphernalia would have been inevitably discovered even if the dog had not alerted, because it would have been discovered during a search incident to arrest.

The military judge also ruled that the duration of the stop (approximately 21 minutes) was reasonable, based on the need to run two separate computer checks on Appellant and his passenger, the delay in receiving the second computer check because of heavy police activity, the inability of Appellant to promptly produce his registration and proof of insurance, and the prompt arrival of the canine unit while Officer Jennewein was still waiting for the computer check and still writing the citation for the out-of-date address.

The military judge concluded that the *Fourth Amendment* was not violated; accordingly, she denied the motion to suppress.

The Court of Criminal Appeals did not disturb the military judge's findings of fact or make additional findings of fact. However, the court held that Officer Jennewein did not have probable cause to stop Appellant for a traffic violation, because Florida law requires a turn signal only when another vehicle is "affected" by the turn,[2] and

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[2] The statute provides:

> No person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, *in the event any other vehicle may be affected by the movement.*

Fla. Stat. ch. 316.155 (2002) (emphasis added).

The Florida Supreme Court has held that § 316.155 is not violated by a failure to signal a turn if the turn did not affect any other vehicle. *State v. Riley*, 638 So. 2d 507, 508 (Fla. 1994). The Florida Supreme Court's interpretation of state law is entitled to full faith and credit, "absent some

Appellant's sudden turn without signaling did not affect Officer Jennewein by causing him to brake or swerve. However, the court concluded that the facts as found by the military judge were sufficient to establish reasonable suspicion sufficient to justify stopping Appellant's vehicle. Finally, the lower court concluded, as did the military judge, that the duration of the stop was reasonable.

Discussion

Appellant now asserts that Officer Jennewein stopped his vehicle under the erroneous belief that he had committed a traffic violation. He also asserts that the facts were insufficient to justify an investigative stop, because there was not enough evidence to establish reasonable suspicion that he was involved in ongoing criminal activity. Appellant has not challenged the duration of the stop.

The Government has not challenged the lower court's holding regarding Florida law. Instead, the Government argues that the totality of the circumstances were sufficient to establish reasonable suspicion that Appellant was engaged in illegal activity. Since the Government does not assert that there was probable cause for a traffic stop of the Appellant's vehicle, we limit our discussion to the question whether Officer Jennewein had reasonable suspicion that Appellant was engaged in criminal activity.

We review issues involving reasonable suspicion de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). An investigative stop of an individual is permissible under the *Fourth Amendment* "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Similarly, an investigative stop of a motor vehicle is constitutionally permissible where there is reasonable suspicion that the

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prevailing federal interest properly proven." *United States v. Allen*, 27 M.J. 234, 239 (C.M.A. 1988).

occupants are engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981). Based on the totality of the circumstances, "The detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.*

The concept of particularized suspicion has two elements. The first element is that "the assessment must be based upon all the circumstances." As the Supreme Court explained:

> The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person.

Id. This process of inferences and deductions "does not deal with hard certainties, but with probabilities." *Id.*

The second element of the particularized suspicion required is "that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* The factual basis for reasonable suspicion must be more than a mere "hunch." *Terry*, 392 U.S. at 27. However, it need not rise to the level of probable cause, and it falls considerably short of a preponderance of the evidence. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

In considering the totality of the circumstances, the detaining officer may consider a series of acts which are innocent in themselves, but which, taken together, warrant further investigation. *United States v. Arvizu*, 534 U.S. 266, 274-75 (2002). While mere presence in a high-crime area, standing alone, is insufficient for reasonable suspicion, it is a "relevant contextual consideration." *Illinois v. Wardlow*, 528

U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972)). Unprovoked flight "is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* Evasive behavior is a relevant consideration. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *United States v. Larios-Montes*, 500 F.2d 941, 944 (9th Cir. 1974) (passengers in vehicle appeared to be trying to hide). The fact that a vehicle appears out of place is relevant. *United States v. Gonzalez*, 190 F.3d 668, 672 (5th Cir. 1999) (Border Patrol agents who were familiar with local traffic on isolated road did not recognize vehicle and noted it had out-of-state license plates). Finally, the time of day is relevant. *Id.*; *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) (presence in known drug area at 1:00 a.m.); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir. 1991) (presence in high-crime area late at night).

In this case, Appellant was twice seen by Officer Jennewein in high crime areas at an unusual time. The first time Appellant's vehicle was parked in "right next to" a well-known drug dealer's house. Appellant's vehicle, owned by an Air Force noncommissioned officer who lived on Patrick AFB, was out of place. Appellant's presence was sufficiently unusual that Officer Jennewein kept his vehicle under surveillance until he was called away by his dispatcher. A short time later, Officer Jennewein saw Appellant's vehicle a second time, cruising in a nearby high-crime neighborhood. As soon as Officer Jennewein pulled out behind Appellant's vehicle, Appellant made a sudden turn into an unpaved alley. Even if the turn was not illegal under Florida law, it was (1) evasive, (2) an indicator of impaired driving, and (3) unusual because it was a sudden turn onto an unpaved alley that was not a customary roadway. Considering the totality of the circumstances, we hold that Officer Jennewein had reasonable suspicion sufficient to justify an investigative stop of the Appellant's vehicle.

When we review a military judge's ruling to admit or suppress evidence, we review the military judge's factfinding under the clearly-erroneous standard and conclusions of law de novo. *United States v. Sullivan*, 42 M.J. 360, 363 (1995). There was no dispute regarding the predicate facts in this case. The only litigated issues at trial were Officer Jennewein's legal authority to stop the Appellant's car and the duration of the stop.

In this case, the military judge erroneously concluded that Officer Jennewein had probable cause to stop the Appellant for a traffic violation. However, the military judge's error was harmless, because the military judge reached the correct result, albeit for the wrong reason. We agree with the Court of Criminal Appeals that the facts found by the military judge were sufficient to establish reasonable suspicion for an investigative stop.

After making the investigative stop, Officer Jennewein quickly discovered evidence that Appellant had failed to update the address on his license and that he was driving while impaired. While Officer Jennewein was writing the citation for the driver's license violation, the canine alerted, giving him probable cause to search the vehicle. See *United States v. Alexander*, 34 M.J. 121, 125 (C.M.A. 1992) (canine's alert provided probable cause for search). Even before the dog alerted, Officer Jennewein had already decided that he had probable cause to arrest Appellant for driving while impaired. We hold that the military judge did not err by denying the motion to suppress the evidence obtained as a result of the investigative stop.[3]

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[3] In light of our holding that Officer Jennewein had reasonable suspicion to stop Appellant's vehicle, and that the canine's alert provided probable cause to search the vehicle, we need not decide whether the military judge correctly concluded that the evidence would have been inevitably discovered.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

CRAWFORD, Chief Judge (concurring in the result):

The issue of whether the police officer had a reasonable suspicion that justified making an investigative stop of Appellant's motor vehicle is admittedly a close question in this case. Nevertheless, what is clear from the factors discussed and the analysis set forth by the majority is that the officer acted with a good faith belief that he had a legally justifiable reasonable suspicion to stop Appellant's motor vehicle. Therefore, I would apply the good faith exception to the exclusionary rule in this case and affirm Appellant's conviction.

This case presents the issue of whether the exclusionary rule should apply to evidence seized as a result of an investigative stop which the officer reasonably, but mistakenly, believed was a violation of Florida traffic law. The question of whether to invoke the good faith exception to a police officer's warrantless stop has divided state and federal courts. See, e.g., *United States v. Ramirez-Lujan*, 976 F.2d 930 (5th Cir. 1992); *United States v. Williams*, 622 F.2d 830, 840 (5th Cir. 1980); *State v. Greer*, 683 N.E.2d 82 (Ohio Ct. App. 1996); but see *State v. Deherrera*, 965 P.2d 501 (Utah Ct. App. 1998). The Military Rules of Evidence permit the admission of evidence derived from searches and seizures that otherwise satisfy the United States Constitution. See, e.g., Military Rules of Evidence 314(k), 316(f).

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The amendment has two clauses -- the reasonableness clause and the warrant clause. It has no express provision for a remedy when evidence is obtained as a result of an illegal search or seizure. For more than 100 years after the American Revolution, the remedy for an illegal search or seizure was a trespass action for damages. In an early English decision, well known in this country, *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765), the police ransacked Entick's home for four hours to obtain pamphlets that were highly critical of the king. Lord Camden, Lord Chief Justice of the Common Pleas, struck down the search warrant and awarded Entick 300 pounds in damages. He declared:

> This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.

Id. at 1064.

The same Lord Camden invalidated the general warrants employed against John Wilkes, per the publication of Issue No. 45, The North Britons. *Wilkes v. Wood*, 98 Eng. Rep. 484 (K.B. 1763). Even the early courts in this country recognized that damages were the appropriate remedy.

> If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue.

Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841).

The first move away from the remedy of damages was signaled in *Boyd v. United States*, 116 U.S. 616 (1886), in which the Court excluded documents obtained from Boyd's house because a "seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633. Justice Bradley derived his conclusion in part from the following passage in *Entick*:

> It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

19 Howell's State Trials at 629.

The remedy the courts eventually formulated, the exclusionary rule for *Fourth Amendment* violations, was first enunciated in *Weeks v. United States*, 232 U.S. 383 (1914). Even after Weeks, the state courts resisted the exclusionary rule. Justice Cardozo questioned whether the "criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E 585, 587 (N.Y. 1926). He commented that although a number of states have applied Weeks, more have

rejected it. "With authority thus divided, it is only some overmastering consideration of principle or of policy that should move us to change. The balance is not swayed until something more persuasive than uncertainty is added to the scales." *Id.* at 588.

Nevertheless, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court applied the exclusionary rule to the states. In Mapp, the Court justified the exclusionary rule by placing emphasis on "the imperative of judicial integrity." *Id.* at 659 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)). The Court reasoned that the government had to play fair and could not be allowed to profit from illegal acts. Justice Black believed that the self-incrimination clause of the *Fifth Amendment* coupled with the *Fourth Amendment* justified the rule. *Id.* at 661-62 (Black, J., concurring).

The Court identified a second reason for the rule: to curb police misconduct effectively. As the Court stated, "the purpose of the exclusionary rule 'is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.'" *Mapp, 367 U.S. at 656* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). The Court emphasized this purpose again in *United States v. Calandra*, 414 U.S. 338, 347 (1974), by stating that the exclusionary "rule's prime purpose is to deter future unlawful police misconduct and thereby effectuate the guarantee of the *Fourth Amendment* against unreasonable searches and seizures[.]"

In *United States v. Leon*, 468 U.S. 897 (1984), the Court applied the good faith exception to the exclusionary rule. Leon, a drug trafficker, was searched pursuant to a "facially valid" search warrant obtained by the state police. At trial, the evidence seized by the police was suppressed. The Court held that the good faith search or seizure by the police pursuant to a warrant does not require exclusion, even though probable cause was lacking. The Court commented that to the extent to which the exclusionary rule has no effect

on the behavior of magistrates as to the right to privacy, it is misplaced. "The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion." *Id.* at 922. While exclusion is certainly warranted where there is a flagrant violation or a reckless disregard of the facts in a case, the deterrence rationale does not work when the officer is acting in good faith, as in this case.

In 1992, this Court adopted *Leon* in *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). The Court recognized that the rationale in Leon "extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached[.]" *Id.* at 39. In the past, the Courts of Military Review had been split on applying the good faith exception, *id.* at 40, and this Court had not clearly addressed the issue. We recognized that the good faith exception would not apply where there is intentional or reckless misconduct by the police, or where the basis for the action was totally lacking, and thus was unreasonable. *Id.* at 41-42. In this instance, there was not a flagrant disregard of the stop rule or unreasonable conduct.

With this background, I now turn to the question of whether and under what circumstances the good-faith exception to the exclusionary rule can and should apply to a warrantless investigative stop by a police officer.

The defendant in Greer was seen by the police officer turning left into a cross-over area without using the left-turn lane provided and then went in the other direction. The officer stopped him for what appeared to be an illegal U-turn, but the Court, interpreting the state's statute, stated the officer's conclusion that it was an illegal U-turn may have been mistaken, yet the Court held that the stop was not unreasonable and applied the good-faith exception to a stop "based upon conduct observed by the officer that the officer mistakenly, but reasonably, believes to constitute a violation

of law." 683 N.E.2d at 83. The stop in Greer was a "minor transgression," and not an intentional or flagrant illegality. *Id.* at 86.

The Fifth Circuit Court of Appeals has applied the good-faith exception to an investigatory stop in Ramirez-Lujon. Ramirez-Lujon was seen by a border patrol agent some 35 miles from the border, 25 miles east of El Paso, Texas, traveling on what was considered "a road to nowhere." 976 F.2d at 931. Drug smugglers were known to use this road to proceed to a known drug distribution center. A border patrol agent with three years' experience knew the locals who lived down that road. When he saw Ramirez-Lujon's pick-up truck, he did not recognize it as a vehicle belonging to one of the ranchers who lived on the road and decided to investigate. After following the vehicle for some four miles, he decided to make a stop.

The court upheld the stop, based either on "the constitutional test of reasonableness or the good-faith exception." *Id.* at 933. The court held that "under all the circumstances, [the border patrol agent] acted with an objectively reasonable good faith belief that he had a reasonable articulable suspicion that legally justified stopping Ramirez[-Lujan]." *Id.* at 934. The court decided not to address the constitutionality of the stop because it "was sufficiently justified under the good-faith exception." *Id.* at 934 n.4.

The rationale in *Greer* and *Ramirez-Lujon* applies to this case. The majority holds that there was reasonable suspicion to stop Appellant.

> Appellant was twice seen by Officer Jennewein in high crime areas at an unusual time. The first time Appellant's vehicle was parked in "right next to" a well-known drug dealer's house. Appellant's vehicle, owned by an Air Force noncommissioned officer who lived on Patrick

> AFB, was out of place. Appellant's presence was sufficiently unusual that Officer Jennewein kept his vehicle under surveillance until he was called away by his dispatcher. A short time later, Officer Jennewein saw Appellant's vehicle a second time, cruising in a nearby high-crime neighborhood. As soon as Officer Jennewein pulled out behind Appellant's vehicle, Appellant made a sudden turn into an unpaved alley. Even if the turn was not illegal under Florida law, it was (1) evasive, (2) an indicator of impaired driving, and (3) unusual because it was a sudden turn onto an unpaved alley that was not a customary roadway. Considering the totality of the circumstances, we hold that Officer Jennewein had reasonable suspicion sufficient to justify an investigative stop of the Appellant's vehicle.

__ M.J. (11-12). Considering all the facts set forth by the majority, it is clear that Officer Jennewein had an objectively reasonable suspicion that Appellant was engaged in criminal activity. Certainly, there was more than one basis for the stop--the fact that one theory was precluded by the Florida statute does not preclude the application of the criminal misconduct theory under these facts.

Rejecting the exclusionary rule in this case would neither denigrate *Fourth Amendment* values nor complicate the right to privacy because this is not a question of police lawlessness. Certainly, deterrence of police misconduct is not necessary in a borderline case like this, where the officer has acted reasonably and in good faith. The courts have applied a reasonableness standard as to apparent authority, see *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (third-party consent); *Winters v. Adams*, 254 F.3d 758 (8th Cir. 2001) (reasonable to detain agitated occupant of parked car who police suspected may be overdosing); *Gallegos v. Colorado*

Springs, 114 F.3d 1024 (10th Cir. 1997) (reasonable to stop and check distraught person walking in the middle of the street), and many other exceptions to the *Fourth Amendment* such that it would be incongruous not to apply it here. *California v. Acevedo*, 500 U.S. 565, 580 (1991) (many reasonableness exceptions to the *Fourth Amendment*).

Whether the exclusionary rule is based on judicial integrity, see, e.g., *Olmstead v. United States*, 277 U.S. 438, 470, 484 (1928) (Holmes and Brandeis, JJ., dissenting), or the deterrence of police misconduct, *Terry v. Ohio*, 392 U.S. 1, 13 (1968), neither justification would require suppression in this case.

A "police officer will not be deterred from an illegal search if he does not know that it is illegal." Charles Alan Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex.L.Rev. 736, 740 (1972). Because the officer's action in this case was reasonable, I would not apply the exclusionary rule and would affirm Appellant's conviction.

BAKER, Judge (dissenting):

I agree with the majority that an officer would have reasonable suspicion to justify an investigative stop of a vehicle where the totality of circumstances indicated that a vehicle had been parked briefly in the early morning hours in the driveway of a house known to be used for drug dealing, and that it was thereafter driven in a manner indicative of impaired driving. However, because I do not believe the facts articulated on the record in this case support such a conclusion, I respectfully dissent. In light of the factual deficiencies in this case, I need not address Judge Erdmann's fair concern regarding whether an appellate court could justify an investigatory stop on grounds of reasonable suspicion where the officer's articulated reason for the stop was a mistaken belief that Appellant had violated the law.

My analysis begins with *United States v. Sokolow*, 490 U.S. 1, 7 (1989), in which the Supreme Court expanded on *Terry* stating:

> In *Terry v. Ohio*, we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause.
>
> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The *Fourth Amendment* requires "some minimal level of objective justification" for making the stop.

Id. at 7 (citations omitted). Thus, reasonable suspicion includes both subjective and objective components -- an officer's reasonable suspicion based on articulable facts objectively reviewed.*

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* This case is different from *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, the issue was whether a court should look beyond an officer's articulated reasons for making an investigatory stop in determining whether reasonable suspicion existed for the stop. *Whren* did not address the question posed here: whether an investigative stop can be upheld under the Fourth Amendment if an objective review of the record supported a finding of reasonable suspicion, despite the fact that the officer did not articulate those reasons as the basis for the stop and the articulated basis for the stop was unreasonable.

The Court of Criminal Appeals applied a purely objective standard of reasonableness in determining that Officer Jennewein had reasonable suspicion to stop

In my view, the *Fourth Amendment* analysis in this case hinges on Officer Jennewein's articulation of two factual questions: where was Appellant's car parked and did Appellant drive his car in an impaired manner?

First, in what manner was Appellant's car "at" the house of a known drug dealer, IL? Was it parked in the driveway, on the street specifically in a manner associated with IL's house or on the street as any other car might have been? Officer Jennewein's testimony is not clear on this point. Appellant's car is characterized at various points in the record as "in front of," "at Steele [St.] and Mathers," "at [IL]'s," "over at [IL]'s," "at a house," and "right next to his house in his dirt driveway or dirt lot." In an urban environment the factual distinction between parking on the street or in a driveway can reflect the difference between particularized suspicion and inchoate suspicion. In the abstract, there is a significant difference between being parked in a "bad crime" driveway, and being parked in a "bad crime" neighborhood, which the Supreme Court has

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Appellant, based on language in *Whren* indicating that "subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." *United States v. Robinson*, 56 M.J. 541, 545 (A.F. Ct. Crim. App. 2001) (citing *Whren*, 517 U.S. at 813). The court looked at all the facts available to Officer Jennewein and concluded that "a reasonable officer aware of these facts would have a lawful basis for a brief investigative stop." *Id.* at 548. However, this approach mischaracterizes the holding of *Whren*. *Whren* did not alter the fundamental requirement that officers conducting investigative stops must articulate facts that support reasonable suspicion. If officers were not required to articulate some basis for the stop, courts would be left to "speculate about the hypothetical reaction of a hypothetical constable," an approach rejected by the Supreme Court in *Whren* as unworkable. *Whren,* 517 U.S. at 815.

held, does not in itself provide reasonable suspicion to justify an investigative stop. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Brown v. Texas*, 443 U.S. 47, 52 (1979). Nor did the Government move this testimony from the abstract to the specific by either reconciling the different testimonial statements regarding the location of Appellant's car or by showing with a map or photograph where Appellant's car was parked, thereby indicating how parking on the street necessarily connected Appellant's car with IL's house. The Government also did not clarify this discrepancy at oral argument, despite persistent questioning from the judges. Moreover, the record does not provide a sufficient factual basis to otherwise infer suspicion from street parking alone.

Second, did Appellant demonstrate indicia of impaired driving and did Officer Jennewein articulate suspected impairment as a basis for stopping Appellant? Here too, the record is amorphous. This may reflect the fact that the *Fourth Amendment* search was argued at trial under the probable cause rubric based on Appellant's (lawful) failure to signal. On appeal, the Government now finds itself arguing an alternative, less developed, theory of reasonable suspicion.

On the one hand, impairment is certainly in the air at the appellate level. Officer Jennewein testified about his training in identifying impaired drivers. Officer Jennewein testified that the failure to signal a turn and other kinds of conduct such as "accelerating, decelerating, swerving in another lane of traffic, wide turn, failure to signal, reckless driving, driving without headlights, [and] erratic braking[,]" are factors suggestive of impaired driving. Officer Jennewein also testified that he would not have followed Appellant's vehicle if he had not previously seen the vehicle parked in some manner adjacent to IL's house.

On the other hand, Officer Jennewein, never fully delivers the punch line by expressly stating that he stopped Appellant's car on account of his suspicion that the driver

was impaired. Moreover, on three separate occasions he testified that the sole reason he stopped the vehicle was failure to properly use the turn signal. Such language does not preclude the possibility that Officer Jennewein was motivated by a concern over impaired driving--the failure to signal being merely the final indicator of impairment--but neither is it a clear articulation of reasonable suspicion of impairment as the predicate for Appellant's stop.

Significantly, the military judge found that the officer "initiated" his stop of the car because Appellant failed to signal properly. The military judge, having heard the testimony of the officer regarding his training, could have found suspected impairment as part of the officer's reasons for stopping Appellant's vehicle, but she chose not to make such a finding. For sure, the military judge may have omitted such a finding because she found it unnecessary given her conclusions that probable cause existed for violation of the statute. However, determining whether the military judge rejected the finding of impairment or simply found it unnecessary to reach would be appellate speculation.

In the absence of probable cause for failure to signal, the Government was left on appeal to stand on two factual legs of a reasonable suspicion ladder: the presence of Appellant's vehicle adjacent to a known drug dealer's house and indicia of impaired driving. Neither leg was clearly articulated in the record of trial. In my view, when the uncertainties in both legs are considered together, the record does not move from an inchoate to a particularized showing of suspicion required by the *Terry/Sokolow* line of cases. Something more particularized than the presence on a street with a house used for drug dealing and bad, but lawful driving, must be articulated to warrant an investigative stop. The Government might have articulated additional relevant facts at trial if it had known its ultimate appellate posture, but that is not the record we have on appeal.

ERDMANN, Judge (dissenting):

I agree with the majority's initial finding that Officer Jennewein lacked probable cause to initiate a traffic stop of Appellant's car, based on his mistaken belief that a traffic violation had occurred. In affirming the Air Force Court of Criminal Appeals, however, the majority goes on to find that the detaining officer had reasonable suspicion to justify an investigatory stop of Appellant's vehicle, i.e., "reasonable suspicion" that the occupants were engaged in wrongdoing. I dissent from both the analysis utilized by the majority and from the finding that the facts known to the officer at the time of the stop rose to the level of reasonable suspicion. I would reverse the Air Force Court of Criminal Appeals.

The initial traffic stop in this case was made by Officer Jennewein solely because Appellant failed to signal when he turned his car into an alley. After the stop a canine unit called by Officer Jennewein alerted on the car and following a consensual search, cocaine was discovered. Appellant was subsequently charged with possession and use of cocaine, amongst other charges. At a proceeding pursuant to Article 39, Uniform Code of Military Justice, 10 U.S.C. § 839 (2000), Appellant contested the admission of the seized evidence, arguing that the initial stop was in violation of the Fourth Amendment. The military judge found no Fourth Amendment violation, ruling that Officer Jennewein had probable cause to stop Appellant for a traffic violation. Appellant subsequently entered a conditional plea of guilty to the possession and use of cocaine specifications.

The Air Force Court of Criminal Appeals found that under Florida law there was no probable cause to believe that a traffic violation had occurred, which rendered the stop in violation of the Fourth Amendment. The lower court rejected, however, Appellant's argument that the evidence derived from the stop must be suppressed. Seeking an alternative basis to uphold the initial stop under the Fourth Amendment, the Air Force court went on to "determine

whether there is some other basis in the law for the stop and the resulting searches that led to the evidence of the use and possession of cocaine." *United States v. Robinson*, 56 M.J. 541, 544 (A.F. Ct. Crim. App. 2001). A divided Air Force Court found that, despite the initial illegal stop based on the traffic violation, the stop was reasonable under the circumstances and the evidence was admissible.

Because Officer Jennewein testified that he made the stop based only on the suspected traffic violation, the Air Force Court adopted an analysis that allowed them to move beyond the officer's stated reason for the stop and determine whether a "reasonable officer" would have had "reasonable suspicion" for the stop. The lower court relied on *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that the subjective intentions of the detaining officer are irrelevant to a Fourth Amendment analysis. In my view, *Whren* is inapposite and provides no basis for seeking an alternate finding of reasonableness after an invalid or unlawful traffic stop. The majority opinion suffers this same delict: there is no transitional analysis supporting an appellate court's authority to search for some other basis to uphold the stop after determining that the only articulated, record basis for the stop was unlawful.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.[1] *Whren*, 517 U.S. at 810. It is important to note that the Court in *Whren* was dealing with a case where the legality of the initial stop was not in question and in fact was not even challenged on appeal. In *Whren* District of Columbia police became

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[1] The cases in this area reference both the "probable cause" standard and "reasonable suspicion" standard. In this context the "probable cause" standard is applied when the officer has reason to believe that an offense has occurred while the "reasonable suspicion" standard is generally applied when the officer believes that criminal activity "may be afoot."

suspicious of the defendant's car due to its temporary license plates, youthful occupants and the fact that the driver remained stopped at an intersection for what seemed to be an unusually long time while looking down into the lap of the passenger.[2] The police then observed the car turn suddenly without signaling and drive off at an "unreasonable" speed, activity that constituted valid traffic violations. The police executed a stop based on the traffic violations and observed two large plastic sacks of crack cocaine in Whren's hands.

The defendants argued that the police did not have probable cause or even reasonable suspicion to believe that they were engaged in an illegal drug activity and that the officer's asserted ground for the stop - to give the driver a warning concerning the traffic violations - was pretextual.[3] The Supreme Court found that the subjective intent of the officers does not play a role in an ordinary probable cause *Fourth Amendment* analysis. The Sixth Circuit later described *Whren* as holding that "an officer may stop a vehicle for a traffic violation when his true motivation is to search for contraband, as long as the officer had probable cause to initially stop the vehicle." *United States v. Hill*, 195

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[2] It is difficult to conclude that these facts, standing alone, would rise to the level of "reasonable suspicion" that criminal activity is afoot.

[3] On appeal the defendants did not dispute that the traffic violations constituted probable cause to support the stop. Rather, they argued that, "in the unique context of civil traffic regulations," probable cause was not enough. *United States v. Whren*, 517 U.S. 806, 810, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996). Specifically they argued that a higher standard was required to deter the pretextual use of traffic stops as a means of investigating other violations of the law as to which no probable cause or even articulable suspicion exists. *Id.*

F.3d 258, 264 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

The Supreme Court in *Whren* quoted *Scott v. United States*, 436 U.S. 128 (1978), for the principle that "subjective intent alone . . . does not make *otherwise lawful conduct* illegal or unconstitutional." 517 U.S. at 813 (emphasis added). *Whren* simply stands for the principle that an officer may legally stop a vehicle after observing suspicious behavior that does not rise to the level of "reasonable suspicion," as long as there is probable cause to believe there has been a traffic violation.

If failing to signal a turn under the circumstances presented in this case had in fact been a valid traffic violation in Florida,[4] then the fact that the officer's real motivation for the stop may have been suspicion of drug activity would not have invalidated the seizure or subsequent search as the officer would have had probable cause to make the traffic stop. Those, however, are not the facts of this case. There is no dispute that Florida law does not prohibit a turn without signaling under the circumstances found here and that Officer Jennewein made the stop based on a mistake of law.

In *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998), police stopped the defendant after he drove his motor home through an intersection with his turn signal on, without changing lanes or turning. The police found marijuana in the motor home as the result of a subsequent consensual search, but it was later determined that flashing a turn signal without turning or changing lanes was not a violation of Texas law. In finding that the evidence was not admissible, the Fifth Circuit stated:

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[4] There is no evidence in this case that Officer Jennewein made the stop based upon a suspicion of illegal drug activity. He testified conclusively that the only reason for the stop was the traffic violation.

> The rule articulated by the Supreme Court in *Whren* provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded. *See Whren*, 116 S. Ct. at 1774; *see also Goodwin v. Johnson*, 132 F.3d 162, 173 (5th Cir. 1998) ("*So long as a traffic law infraction that would have objectively justified the stop had taken place*, the fact that the police officer may have made the stop for a reason other than the occurrence of the traffic infraction is irrelevant for purposes of the Fourth Amendment." (emphasis added)). Here, given that having a turn signal on is not a violation of Texas law, no objective basis for probable cause justified the stop of Miller.

146 F.3d at 279 (footnote omitted).

In *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999), the Fifth Circuit again addressed this area where an officer mistakenly stopped a car for an improper taillight. Although the officer thought in good faith that the broken taillight constituted a traffic infraction the court held that there was no probable cause for the stop. The government argued that the drugs seized as a result of the stop should be admitted under the good-faith exception to the exclusionary rule, but the Court disagreed:

> Under the general rule established in *Whren*, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. *See Goodwin v. Johnson*, 132 F.3d 162, 173 (5th Cir. 1998). But if officers are

> allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive. Accordingly, we hold that [the officer's] actions do not pass muster under the good-faith exception to the exclusionary rule.

178 F.3d at 289.

In *United States v. Mariscal*, 285 F.3d 1127 (9th Cir. 2002), a case remarkably similar to the underlying facts of this case, police were conducting an undercover surveillance of a residence and a vehicle parked at the residence. They observed the car pull away from the house and make a right turn without using mechanical or hand signals. A traffic stop was made based on the failure to signal a turn. A subsequent search of the car revealed a concealed weapon and one of the occupants admitted that the gun was his and that he was in the country illegally. Relying on a long line of Ninth Circuit authority, the court stated:

> If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver. So, when an officer thought that a Baja California vehicle registration statement had to be visible from the rear, whereas the Baja California law required that it be on the upper right corner of the windshield, the officer's mistaken belief could not "justify the stop under the Fourth Amendment." *United States v. Lopez-Soto*, 205 F.3d 1101, 1106. Similarly, when an officer thought that Michigan required cars to

have two license plates, but it indeed only required one, a stop based on the two-plate theory was not based on reasonable suspicion. *United States v. Twilley*, 222 F.3d 1092, 1096. Simply put:

> A suspicion based on such a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because "the legal justification [for a traffic stop] must be objectively grounded." In other words, if an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment.
>
> *Id.* (citations omitted); see also *United States v. King*, 244 F.3d 736, 741-42 (9th Cir. 2001) (a mistaken belief that a driver's conduct violated the law could not support a reasonable suspicion that a crime had been committed, even if the officer otherwise behaved reasonably).

285 F.3d at 1130.

While it is clear under *Whren* that evidence seized as the result of a pretextual, although otherwise legal, traffic stop is admissible, the issue here is whether *Whren* provides authority for an appellate court to uphold admitting evidence seized subsequent to an illegal traffic stop on the basis that the stop was a lawful investigative stop based on reasonable suspicion. Clearly it does not. The general rule is that if an initial stop violates the Fourth Amendment, the evidence seized as a result of the stop is subject to suppression. *United States v. Childs*, 256 F.3d 559 (7th Cir. 2001).

Although the majority opinion does not provide the legal basis for their analytical transition from the initial illegal stop to the "reasonable suspicion" review, the danger in both its approach and that of the Air Force Court is that an officer can use an illegal traffic stop with impunity as long as an alternative theory for admissibility of the evidence can later

be developed. As noted in *Lopez-Valdez*, 178 F.3d at 289, if a subjective but mistaken belief that a traffic violation has occurred is all that is required, "the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." Further, once the illegal traffic stop is made there is a natural tendency to utilize the events and evidence discovered after the stop to justify the initial stop, as evidenced by the extent to which those facts are exhaustively discussed the decisions of both Court of Criminal Appeals and the majority opinion.

There is something troubling about a concept where the initial police action violates the Fourth Amendment but an appellate court later develops a theory which allows the admission of the evidence. In upholding the admission of evidence seized subsequent to an illegal traffic stop on the basis that the stop was a lawful investigative stop based on reasonable suspicion, the majority extends that concept further than any reported court decision. I would hold that under the Fourth Amendment the admission of the evidence is not allowable and would reverse the court below on that basis.

However, even if the traditional analysis were applicable to this situation, I would find a lack of "reasonable suspicion." Absent a warrant or probable cause to believe that an occupant has committed or is committing a crime, including a traffic violation, a law enforcement officer may lawfully stop a vehicle when the officer has a reasonable, articulable suspicion that criminal activity is afoot involving the vehicle. An "officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (internal quotation marks omitted)).

The majority sets forth three grounds in support of their finding of "reasonable suspicion:"

Appellant was twice seen by Officer Jennewein in high crime areas at an unusual time.

Actually, Appellant was not seen twice by Officer Jennewein. The officer initially noticed a parked maroon four-door Oldsmobile that was registered to the Appellant. However, he did not see the Appellant or anyone else in the car and he had no idea who was driving the car. The record is unclear as to where the car was parked, other than the fact that it was parked in the vicinity of a "known crack-house."

At the Article 39(a) hearing, Officer Jennewein testified inconsistently as to exactly where the car was parked - and this is a critical element for the Government to establish in the "reasonable suspicion" analysis. If the car was legally parked on a public street, then it would be less suspicious than if it were parked "next to" or "in the driveway" of a known crack house. On two occasions Officer Jennewein testified that the car was parked "in front" of the house and three times he simply stated the vehicle was "at" the house. On a single occasion he testified that the car was parked "right next" to the house in the "dirt driveway or dirt lot." There is no reason to believe that Officer Jennewein's single assertion that the car was parked next to the house is any more believable than his multiple assertions that it was parked in front of or at the house. The Air Force court found only that the car was "parked outside the home." *Robinson*, 56 M.J. at 547. The parties stipulated later as part of the conditional plea that Appellant's car was "parked on Steele Street."

The second time Officer Jennewein observed the car, Appellant was driving down the public street in a legal manner. The officer had not seen Appellant in the "known crack house" nor had he seen him with any known criminals or drug dealers.

Appellant's vehicle, owned by an Air Force noncommissioned officer who lived on Patrick AFB, was out of place.

The fact that a vehicle or individual is located in a high crime area is not, in itself, evidence of illegal conduct.[5] Further, the fact that the vehicle was registered to an Air Force noncommissioned officer adds little to a "reasonable suspicion" analysis. Officer Jennewein's testimony that "it's not a kosher place for a [military] member or a family member to be" leads to the conclusion that it may be a kosher place for an individual who is not a member of the military. Military members come from all socio-economic backgrounds and may well have valid reasons to visit family and friends in what are characterized as "high crime areas." It is completely inappropriate to categorize military members as a "class" deserving higher attention or suspicion from the police.

As soon as Officer Jennewein pulled out behind the Appellant's vehicle, the Appellant made a sudden turn into an unpaved alley. Even if the turn was not illegal under Florida law, it was (1) evasive, (2) an indicator of impaired driving, and (3) unusual because it was a sudden turn onto an unpaved alley that was not a customary roadway.

Officer Jennewein testified that once he saw the four-door maroon Oldsmobile drive by he "pulled out and as soon as [he] pulled out, [he] got right behind it and the individual pulled into an alley which is between Guava and Avocado

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[5] *Brown v. Texas*, 443 U.S. 47, 52 (1979); *United States v. Basey*, 816 F.2d 980, 989 (5th Cir. 1987); *United States v. Davis*, 94 F.3d 1465, 1470 (10th Cir. 1996); *United States v. Sprinkle*, 106 F.3d 613, 618 (4th Cir. 1997); *United States v. Green*, 111 F.3d 515, 520 (7th Cir. 1997), *cert. denied*, 522 U.S. 973 (1997).

[Streets] and he failed to signal." Officer Jennewein clarified, however, that the distance between his vehicle and Appellant's was 150 feet. While Officer Jennewein initially stated that the Appellant "slammed on" his brakes when he pulled his police cruiser into the street, he corrected himself and testified that the Appellant "decelerated and stepped on the brake pedal and abruptly turned right into the alleyway." The Air Force court determined only that "within two or three seconds that Appellant quickly turned off the roadway, without signaling." *Robinson*, 56 M.J. at 548. While certain conduct that constitutes flight or avoidance of police is suggestive of wrongdoing,[6] individuals driving in a normal, lawful manner have not been considered to be evasive.[7] At no time did Officer Jennewein testify that Appellant tried to evade him, speed away, or do anything other than turn suddenly into an alley and then stop after the officer turned his emergency lights on.

Impaired driving is simply not a reasonable conclusion to be drawn from these facts. Absent an underlying traffic offense, the mere failure to use a turn signal is not indicative of criminal activity being afoot, including impaired driving. Where the law does not mandate the use of the turn signal in the first place, the wholly lawful act of turning without using the signal bears no reasonable relationship to a lapse of judgment indicative of impaired driving. The record makes clear that Officer Jennewein did not perceive impairment as a basis for his actions at the time this stop was actually made

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[6] *United States v. Raibley*, 243 F.3d 1069 (7th Cir. 2001); *United States v. Elkins*, 70 F.3d 81 (10th Cir. 1995); *Commonwealth v. Grandison*, 741 N.E.2d 25 (Mass. 2001); *State v. Vadnais*, 677 A.2d 155 (N.H. 1996).

[7] *Sprinkle*, 106 F.3d at 617-18; *State v. Haviland*, 532 N.W.2d 767 (Iowa 1995).

and it was not found as a basis for the stop by the military judge or the Court of Criminal Appeals.

The majority engages in speculation when it states that the alley into which Appellant turned was not "customarily" used as a roadway. This alley was not a short dead-end; it was a through alley connecting two streets in the area of an apartment building. According to Officer Jennewein, the alley "was used by all the residents." A reasonable, if not the sole, purpose of this alley is vehicular traffic.[8]

"Reasonable Suspicion"

"Reasonable suspicion" is "a particularized and objective basis" for suspecting the person stopped of criminal activity. *Ornelas-Ledesma v. United States*, 517 U.S. 690, 696 (1996). "Reasonable suspicion" is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity. *United States v. Twilley* 222 F.3d 1092, 1096 (9th Cir. 2000).

The pre-stop specific, articulable facts in this case simply do not constitute "reasonable suspicion." Although recognizing that a Fourth Amendment analysis of reasonable suspicion is objective and viewed through the eyes of the reasonable officer, the Supreme Court has also held that reviewing courts should look to the specialized training and experience of the detaining officer to make inferences that might elude an untrained person.[9] This analysis cuts both ways, and here it is important to note that none of the reasons

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[8] Interestingly, after the stop Officer Jennewein discovered that the passenger in Appellant's car lived "right there on Avacado [Street]." To an experienced officer familiar with the area, a turn at this point to drop off a passenger or visit a resident of the apartment building would be usual and "customary."

[9] *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

cited by the majority rose to a level that Officer Jennewein, with his specialized training and experience, considered sufficient to rely upon as a basis for a "reasonable suspicion" stop. Rather, Officer Jennewein testified repeatedly that the only basis for the stop was his belief that a traffic violation had occurred. The majority is then left with the difficult task of constructing a basis for "reasonable suspicion" where the detaining officer articulated the grounds relied upon by the majority and found them lacking.

The weight of evidence in the record indicates that Appellant's car was legally parked on a public street in a high crime area. Appellant was not seen in the area of the crack house, nor was he seen going into or out of the house. The presence of his car in this location does not create a nexus between him and criminal drug activity. While Appellant's military status seemed to have struck a chord with Officer Jennewein, from an objective standpoint it does not create or increase the level of suspicion. Assuming that it was unusual for a car to be parked in that area, then it should be no more unusual if the car is owned by a military member or by a civilian.

The fact that Officer Jennewein later saw the car driving down the street does not add any additional cause for suspicion. The car had been earlier seen parked in the area and it is logical that at some point it would be driven to another location. Under these circumstances the legal movement of a vehicle on a public street does not provide any additional basis for "reasonable suspicion." Finally, Appellant made a legal turn into an alley. While Officer Jennewein and the majority characterize the turn as "sudden," Appellant didn't slam on his brakes, drive in an erratic fashion or do anything else that would bring attention to him - other than failing to turn on his turn signal. In fact, in a matter of three to four seconds, Officer Jennewein covered the 150 foot distance between his vehicle and

Appellant's, and followed Appellant through the turn before effecting the stop.

Under the rationale adopted by the majority the following facts would constitute "reasonable suspicion" that the car was involved in illegal drug activity or that the driver was impaired: a car owned by military member was seen parked in a high crime area late at night in the vicinity of a known crack house; the car was later seen driving down a public street and turning into an alley in a sudden but legal manner.

Conclusion

The initial stop for a traffic offense was invalid and violated the Fourth Amendment. I would hold the evidence should have been suppressed and reverse the Air Force Court of Criminal Appeals on that basis. Even if I engaged in a traditional reasonable suspicion analysis, unembellished by what transpired after the illegal stop, these facts do not rise to the level of "reasonable suspicion" and the evidence should have been suppressed.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant WINCHESTER ROBINSON, United States Air Force

ACM 33925

29 October 2001

Sentence adjudged 8 October 1999 by GCM convened at Patrick Air Force Base, Florida. Military Judge: Barbara G. Brand.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-4.

Appellate Counsel for Appellant: Lieutenant Colonel Timothy W. Murphy and Major Stephen P. Kelly.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Major Lance B. Sigmon, and Major Leslea T. Pickle.

Before

SCHLEGEL, ROBERTS, and BRESLIN
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Judge:

At a preliminary session of this general court-martial, the appellant moved to suppress evidence of the appellant's use and possession of cocaine, discovered as a result of a traffic stop and ensuing searches of the appellant and his vehicle. After hearing evidence and argument, the military judge denied the motion.

Thereafter, the appellant was convicted, in accordance with his pleas, of the wrongful use and possession of cocaine, simple assault upon his spouse, and two specifications of disobeying lawful orders, in violation of Articles 112a, 128 and 92, UCMJ, 10 U.S.C. §§ 912a, 928, 892. Pursuant to (R.C.M.) Rule for Courts-Martial 910(a)(2), the convening authority and the military judge accepted the appellant's conditional guilty plea to the drug offenses, thereby preserving for appellate review the correctness of the military judge's ruling. The sentence adjudged and approved included a bad-conduct discharge, confinement for 6 months, and reduction to E-4.

The appellant now renews his argument that the traffic stop was unlawful and that the military judge should have suppressed the results of the searches. He also maintains he is entitled to a new post-trial action because the convening authority failed to include in the formal action a reference to the approved waiver of involuntary forfeitures under Article 58b, UCMJ, 10 U.S.C. § 858b.

Motion to Suppress

Mark Jennewein is an officer in the police department of Melbourne, Florida. Previously, he had been an Air Force security policeman for over five years, most recently at Patrick Air Force Base (AFB), Florida. On 27 February 1999, he was working the midnight shift in Melbourne. He was on routine patrol in a marked police cruiser in a high-crime area known for its drug and prostitution activity. At about 0100 hours, he noticed a maroon, four-door Oldsmobile parked in the dirt driveway of a house belonging to a drug dealer well known to him. Officer Jennewein

checked the license plate number through his computer, which revealed that the car's owner lived on Patrick AFB. He examined the stickers on the car, noting that it bore a yellow sticker meaning the registered owner was a non-commissioned officer assigned to Patrick AFB. Officer Jennewein waited across the street at the Community Policing Unit field office to see if anyone approached the vehicle. He radioed another patrolman, Officer Duffy, who was also a reservist assigned to Patrick AFB, who informed him the address was next door to a former supervisor's house on the installation. After 10 or 15 minutes, Officer Jennewein was called away for other duties.

A short time later, Officer Jennewein parked his patrol car behind a vacant store on US Route 1, a location known to be frequented by prostitutes. Shortly after arriving, Officer Jennewein saw the same maroon Oldsmobile traveling on the roadway. He pulled out and got right behind the vehicle. Within two or three seconds, the Oldsmobile turned off the roadway into an alley without giving a turn signal. Officer Jennewein indicated that he was directly behind the vehicle when it turned, but that the other driver's failure to use his turn signal did not cause the officer to brake suddenly, or swerve to void the vehicle. Officer Jennewein activated his red and blue lights and made a traffic stop.

Officer Jennewein approached the Oldsmobile and asked the driver (the appellant) to produce his driver's license, registration, and proof of insurance. The appellant fumbled with his wallet, and was able to present his driver's license but not the other requested items. Officer Jennewein told him to keep looking for the other documents. Officer Jennewein then inquired how the appellant knew the passenger, and the appellant indicated they had just met.

Officer Jennewein then spoke to the passenger, Floyd Simmons. Mr. Simmons was "rough" looking, with tattered clothing, and somewhat emaciated, "like a street person." He

had no identification, but said he lived in the neighborhood. Mr. Simmons said he knew the appellant because they were block masons, and worked together for the last six months at the Daily Labor. Officer Jennewein called in Mr. Simmon's information on his police radio to check for outstanding warrants. Finding none, he allowed Mr. Simmons to leave.

Officer Jennewein returned to the appellant, who had found his registration. Officer Duffy arrived in her patrol car as a back-up. Officer Jennewein noticed that the appellant's address on his license did not match the address on his registration. The officer then radioed in the appellant's personal information to check for outstanding warrants.

Officer Jennewein asked the appellant if he had any drugs or weapons in his car, and the appellant said he did not. Officer Jennewein asked for consent to search the vehicle, but the appellant declined. Officer Jennewein radioed for a canine unit. During this time, Officer Jennewein was still waiting for a response to his radioed inquiry concerning the appellant. During the conversation with the appellant, Officer Jennewein noticed an odor of alcohol coming from the appellant's person. The appellant's speech seemed somewhat "mumbled," and his eyes were watery and bloodshot.

Officer Jennewein began writing a citation for failing to change the address on his registration. While he was writing the citation, the canine unit arrived. Officer Jennewein asked the officer to walk the drug-detecting dog, Rexx, around the appellant's car. Officer Jennewein advised the appellant that he suspected him of driving under the influence of alcohol. Officer Jennewein asked if he would submit to a field sobriety exercise. The appellant declined. At that time, the drug-detecting dog alerted on the appellant's vehicle, indicating the dog detected the odor of narcotics. Officer Jennewein advised the appellant he was being detained upon probable cause that he had a narcotic substance in his car, handcuffed him, and placed him in the patrol car.

Officers Jennewein and Markowski searched the appellant's vehicle, and found cocaine in rock form and a metal rod, curved on one end, which they recognized as drug abuse paraphernalia. A field test at the scene was positive for cocaine. Officer Jennewein then informed the appellant he was under arrest for possession of cocaine as well as driving under the influence of alcohol.

The defense moved to suppress all the fruits of the search of the appellant's car and his person. Defense counsel cited *State v. Riley*, 638 So. 2d 507 (Fla. 1994), a decision of the Florida Supreme Court holding that failure to use a turn signal is not an offense under Florida law where the turn did not affect other vehicles. The defense counsel argued that since the failure to use a turn signal was not an offense, the officer had no probable cause to stop the appellant's vehicle, and the evidence obtained from the unlawful stop must be considered fruit of the poisonous tree. Defense counsel also maintained that the stop took too long, essentially becoming an unlawful detention. The trial counsel cited *Terry v. Ohio*, 392 U.S. 1 (1968), and argued that all that was required to conduct a brief investigative stop on a vehicle was a reasonable, articulable suspicion of criminal activity. Trial counsel argued that considering all the facts known to the officer that night, there was a legally sufficient basis for the stop. The military judge denied the motion, finding that Officer Jennewein had probable cause to believe the appellant had violated Florida state law requiring the use of a turn signal because Officer's Jennewein's vehicle "may have been affected" by the appellant's turn. The military judge found that the stop was not unreasonably long under the circumstances. She also found that the alert by the drug-detecting dog provided probable cause to search the appellant's vehicle.

The appellant argues to this Court that the military judge erred in denying the motion to suppress. The appellant maintains that it is not unlawful in Florida to turn without

signaling if no other vehicle is affected by the turn. *Riley*, 638 So.2d at 507. The appellant contends Officer Jennewein did not have probable cause to believe that a traffic violation had occurred, therefore the stop was unlawful and the fruits of the unlawful seizure must be suppressed. The government responds that there was evidence on the record from which we could determine that there was traffic on the roadway that may have been affected by the turn. The government also argues that the failure to signal created a reasonable suspicion that the driver was intoxicated, which was sufficient to justify an investigative stop.

We review a military judge's decision to deny a motion to suppress evidence for an abuse of discretion. *United States v. Beckett*, 49 M.J. 354, 356-57 (1998). Findings of fact are reviewed using a clearly erroneous standard, and conclusions of law are reviewed de novo. *United States v. Ayala*, 43 M.J. 296, 298 (1995).

In ruling on the motion, the military judge made extensive findings of fact and conclusions of law. The military judge's findings of fact are supported by the evidence presented during the hearing and are not clearly erroneous. The military judge also concluded as a matter of law that Officer Jennewein had probable cause to believe that a traffic violation had occurred when he saw the appellant's car, which was right in front of his, brake suddenly and turn right without signaling. The military judge ruled this was a violation of the Florida statute requiring turn signals when any other vehicle "may" be affected by the movement. We review this conclusion de novo.

Florida Statute § 316.155 (1999) provides,

> (1) No person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, in the event

> any other vehicle may be affected by the movement.

In *Riley*, 638 So. 2d 507, the Florida Supreme Court held that this statute required proof that another vehicle was actually affected by the turn. It is arguable that the Court in *Riley* did not specifically rule on this construction, but instead focused their analysis on whether subsections (1) and (2) of the statute must be construed separately or in *pari materia*. However, later decisions of the Court held that the statute requires that another vehicle actually be affected. *See State v. Daniel*, 665 So.2d 1040 (1995), *overruled on other grounds*, *Holland v. State*, 696 So.2d 757 (1997). The Florida Supreme Court is the ultimate authority on the scope and construction of state statutes. *United States v. Allen*, 27 M.J. 234, 238 (C.M.A. 1988). Although the construction in *Riley* seems to strain the language of the statute, it is binding. For this reason, we must conclude that the military judge erred in applying the Florida law, and that Officer Jennewein did not have probable cause to believe the appellant had committed a crime based upon the appellant's failure to provide a turn signal.

The appellant contends that the lack of probable cause for arrest requires that all the evidence derived from the arrest be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Contrary to the appellant's contention, however, this does not end our inquiry. We must determine whether there is some other basis in the law for the stop and the resulting searches that led to the evidence of the use and possession of cocaine.

A. Objective Review

The first issue is whether this Court, in reviewing the basis for the stop, is limited to considering the reasons subjectively relied upon by Officer Jennewein. Although there is little military case law on this matter, the Supreme

Court has made it clear that we are not bound by the officer's subjective basis for the stop. In *United States v. Robinson*, 414 U.S. 218 (1973), the Court considered the lawfulness of a search incident to apprehension, when the arresting officer testified that he had no fear of the respondent and did not suspect the respondent was armed. The Court made clear that the officer's subjective beliefs were not controlling, rather the fact of the lawful arrest established the legal authority to search the subject. *Id.* at 235.

In *Scott v. United* States, 436 U.S. 128, 138 (1978), the Supreme Court considered a case involving a wiretap under 18 U.S.C. §§ 2510-2520 (1976) which required law enforcement officers to minimize the interception of communications not otherwise subject to interception. The law enforcement agent testified that no real effort had been made to minimize the interceptions. The government argued nonetheless that the interceptions were reasonable under the circumstances. The District Court ordered the results of the wiretap suppressed based upon the officer's testimony. Ultimately, the Court of Appeals reversed the District Court, ruling that "the presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied," but went on to hold that "the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions." *Scott*, 436 U.S. at 134 (quoting *United States v. Scott*, 516 F.2d 751, 756 (D.C. App. 1975)). The Supreme Court adopted the analysis of the Court of Appeals, holding that the officer's subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional.

The Supreme Court in *Scott* prescribed a two-step approach to the required analysis. First, a Court must determine whether there has been a statutory or

constitutional violation. This is not based upon the officer's subjective purpose, but rather based upon an objective review of the facts known to him at that time. The Supreme Court held that the officer's subjective state of mind does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. If a reviewing court finds a violation, then it proceeds to the second part of the analysis--what remedy is appropriate. In this second part of the analysis, "official motives may play some part in determining whether application of the exclusionary rule is appropriate." *Scott*, 436 U.S. at 135-36.

In *Whren v. United States*, 517 U.S. 806 (1996), plainclothes vice-squad members patrolling a "high-drug area" in Washington D.C. became suspicious when they observed a vehicle stopped at an intersection for an unusually long time--more than 20 seconds--with youthful occupants and a driver looking into the passenger's lap. When the unmarked patrol car turned around and headed back to the vehicle, the suspect vehicle turned suddenly, without signaling, and drove off at an unreasonable speed. The police followed, overtook the suspect vehicle at a traffic light, and stopped the suspect vehicle. The officers saw two bags of what appeared to be crack cocaine in the passenger's lap, and arrested the subjects. At a pretrial suppression hearing, the defense argued that the officer's asserted reason for the traffic stop--to give the driver a warning about traffic violations--was pretextual. The District Court denied the motion to suppress. The Court of Appeals affirmed, holding that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *United States v. Whren*, 53 F.3d 371, 374-75 (C.A.D.C. 1995). The Supreme Court affirmed, holding

that subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis. 517 U.S. at 813.

The Supreme Court reaffirmed its position in *Whren* in *Arkansas v. Sullivan*, 532 U.S. 769 (2001). There, the Arkansas Supreme Court declined to follow *Whren*, and upheld the suppression of evidence based upon the trial court's findings concerning the police officer's ulterior motives. The Supreme Court reversed, noting again the Court's "unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers . . . ." *Arkansas v. Sullivan*, 121 S.Ct. at 1878. The Court also made it clear that the Arkansas Supreme Court "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.* (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)) (emphasis in original). *See also Ohio v. Robinette*, 519 U.S. 33 (1996).

The Supreme Court's holding is, of course, binding upon this Court. "This test . . . is purely objective and thus there is no requirement that an actual suspicion by the officer be shown." 4 Wayne R. LaFave. *Search and Seizure, A Treatise on the Fourth Amendment*, § 9.4(a), p. 139 (3d ed. 1996). The Court in *United States v. McKie*, 951 F.2d 399, 402 (D.C. Cir. 1991) phrased it succinctly: "The *Terry v. Ohio*, 392 U.S. 1 (1968) standard being one of objective reasonableness, we are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious." *See also United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (customs officers were entitled to board vessel in navigable waters to review documents under federal statute, and the fact that they were following an informant's tip of drug activity and were accompanied by a Louisiana state policeman does not undermine that

authority); *State v. Hawley*, 540 N.W.2d 390 (N.D. 1995) (even though officer admitted he did not form any suspicion of criminal behavior, the automobile stop was lawful because the "reasonable-and-articulable-suspicion standard" is objective, and it does not hinge upon the subjective beliefs of the arresting officer). Indeed, even if the officer is unaware of a violation of state law at the time of the stop, the fact of such a violation may be considered by a reviewing court in determining the objective reasonableness of the stop. *State v. Vento*, 604 N.W.2d 468 (S.D. 1999).

Thus we conclude that we are not limited to the belief subjectively relied upon by Officer Jennewein as the basis for the stop. Instead, we must consider objectively all the facts known to him at that time in determining the basis for the stop.

B. Basis for the Stop

As discussed above, Officer Jennewein did not have probable cause to believe a traffic violation had occurred, and therefore he had no probable cause to arrest the appellant on that basis. However, the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime. The Supreme Court has made it clear that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information" may be reasonable "seizure" under the Fourth Amendment. *Adams v. Williams*, 407 U.S. 143, 145-46 (1972). *See also Terry v. Ohio*, 392 U.S. 1 (1968).

These brief investigative stops may be used for persons in a moving vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) ("when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke

suspicion"). One's expectation of privacy in an automobile and freedom in its operation are significantly different from the traditional expectation of privacy and freedom in a personal residence. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891, 896 n.2 (1975). Nonetheless, a random stop of a vehicle for no reason, however brief, constitutes an unlawful seizure under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979). "Officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Brignoni-Ponce*, 422 U.S. at 884.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. *See, e.g. Brown v. Texas*, 443 U.S. 47, 51 [(1979)]; *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 [(1975)].

United States v. Cortez, 449 U.S. 411, 417-18 (1981). *See United States v. Sokolow*, 490 U.S. 1 (1989) (reasonable suspicion requires evaluating the totality of the circumstances); *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990) (standard is objective reasonableness); *United States v. Wright*, 476 F.2d 1027 (5th Cir. 1973);

United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973) ("founded suspicion").

Courts consider a wide variety of factors in determining whether there are articulable reasons or founded suspicion for a stop.

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U.S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F.2d 455 (CA9), cert. denied, 417 U.S. 972 [ ] (1974). They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. *See United States v. Larios-Montes*, 500 F.2d 941 (CA9 1974); *Duprez v. United States*, 435 F.2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion.

Brignoni-Ponce, 422 U.S. at 884-85.

There is a substantial body of case law discussing the kinds of facts and circumstances giving rise to a reasonable suspicion sufficient to justify a *Terry* stop. *See generally* 4 LaFave, *supra*, at § 9.4(f). One frequently cited factor is the subject's reaction to the presence of the police, including running away (*United States v. Wilson*, 2 F.3d 226 (7th Cir. 1993)); changing direction to avoid the police (*United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568

(1985)); or trying to conceal objects or themselves (*United States v. Paleo*, 967 F.2d 7 (1st Cir. 1992); *Brown v. United States*, 546 A.2d 390 (D.C. 1988); *United States v. Tate*, 648 F.2d 939 (4th Cir. 1981)). Another factor commonly considered is whether the individual "fits" the area in which he is found. "If the individual is of a race or economic status not ordinarily to be found in that area," it may be considered in assessing the degree of suspicion that exists. 4 LaFave, *supra*, § 9.4(f), p.183. *See also People v. Bower*, 24 Cal. 3d 638, 156 Cal. Rptr. 856, 597 P.2d 115 (1979); *Racine v. State*, 286 So. 2d 890 (Ala. Crim. App. 1973). Time of day is also a common factor, with the lateness of the hour often generating grounds for suspicion, depending upon the location and the activity in question. *United States v. Lender*, 985 F.2d 151 (4th Cir. 1993). The nature of the area in which the suspect is found is often considered, especially in areas where illegal activity is known to occur. *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995).

In this case, Officer Jennewein observed the appellant's automobile parked outside the home of a well-known narcotics dealer at about 0100 hours. Upon inspecting the parked car he saw Patrick AFB registration stickers. As a former Air Force security policeman he knew that the stickers meant the owner was a noncommissioned officer assigned to Patrick AFB. He subsequently learned that the owner lived on Patrick AFB. Thus, the vehicle was "out of place." Later, at about 0130 hours, while parked in his patrol car in an area of town known for drug and prostitution activity, Officer Jennewein saw the appellant driving the vehicle. Officer Jennewein pulled his marked patrol car into traffic right behind the appellant, and within two or three seconds the appellant quickly turned off the roadway, without signaling. Considering all these factors, we conclude that a reasonable officer aware of these facts would have a lawful basis for a brief investigative stop.

To be reasonable under the Fourth Amendment, an investigative stop must be brief. *United States v. Place*, 462 U.S. 696, 709-10 (1983). There is no bright-line rule concerning the length of a "reasonable" stop--all the circumstances must be considered. *United States v. Sharpe*, 470 U.S. 675, 685-86 (1985). The detaining officer may take the time to review the driver's license, registration certificate and proof of insurance, and run a computer check on the car and driver. *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993); *United States v. Rodriguez*, 44 M.J. 766, 772 (N.M. Ct. Crim. App. 1996), *set aside on other grounds*, 50 M.J. 38 (1998). In this case, after the initial stop, the appellant's apparent intoxication provided Officer Jennewein a reasonable basis to detain the appellant further. Once the appellant produced his registration that did not match his driver's license, Officer Jennewein had probable cause to believe the appellant had committed a traffic offense. When the drug-detecting dog alerted on the vehicle, the officer had probable cause to arrest the appellant for possession of narcotics. *Florida v. Royer*, 460 U.S. 491 (1983).

We conclude that Officer Jennewein's stop of the appellant's vehicle was reasonable under the circumstances. The evidence derived from the subsequent searches of the appellant and his vehicle was properly seized and admitted into evidence.

Failure to Note the Waiver in the Action

After trial, the appellant asked the convening authority to defer the automatic forfeitures under Article 57(a), UCMJ, 10 U.S.C. § 857(a), until the date of action, and to waive the automatic forfeitures under Article 58b, UCMJ, in the maximum amount for six months. The convening authority denied the request for deferment, but granted the waiver for a period of six months beginning 14 days after the date of the sentence. The waiver of forfeitures was for the purpose of an involuntary allotment in support of the appellant's family, and was ordered to be paid to the appellant's spouse directly.

On 12 December 1999, the convening authority took action approving the findings and sentence. The formal action did not note the approved waiver of forfeitures. There is no evidence the appellant's spouse did not receive the monies ordered paid through the involuntary allotment.

The appellant argues that the failure to include mention of the approved waiver of forfeitures requires a new action. We disagree.

Article 58b, UCMJ, requires automatic forfeitures during periods of confinement for qualifying sentences. Subsection (b) of that provision authorizes the convening authority to waive "any and all of the forfeitures of pay and allowances . . . for a period not to exceed six months." The statute does not place a time limit on the convening authority's decision, or require that it be included in the formal action approving the findings or sentence. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, P 9.7.3 (3 October 1997), in effect at the time of this trial, provided that the convening authority may waive automatic forfeitures any time prior to acting on the sentence. AFI 51-201, § 9.8.4 provided that approval of a waiver "should be" memorialized in the convening authority's action. This language is permissive rather than mandatory. We conclude that the action of the convening authority is not the instrument that effects an approved waiver of automatic forfeitures, rather it is a means of memorializing the event. The failure to note the approved waiver of automatic forfeitures in the action does not invalidate an otherwise proper action.

Conclusion

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

SCHLEGEL, Senior Judge (dissenting in part):

I would hold that the judge erred in failing to suppress the evidence obtained from the stop and search of the appellant and his car. As a result, I would set aside the findings of guilty and dismiss Charge I and its specifications. This case turns on the Florida Supreme Court's decision in *State v. Riley*, 638 So. 2d 507 (Fla. 1994), Officer Jennewein's trial testimony about why he stopped the appellant, and federal case law concerning traffic stops.

The defendant in *Riley* was the passenger in a car that was stopped for failing to use a turn signal pursuant to Fla. Stat. § 316.155 (1999), which provides that:

> (1) No person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, in the event any other vehicle may be affected by the movement.

During the stop, the police discovered the defendant had some marijuana. The trial court, in suppressing the marijuana, found that the police officers, who were engaged in drug enforcement operations, had no basis to stop the car because no other cars were affected by the driver's failure to signal before turning. The Florida Supreme Court, in affirming the lower court, held,

> If no other vehicle is affected by a turn from the highway, then a signal is not required by the statute. If a signal is not required, then a traffic stop predicated on failure to use a turn signal is illegal and any evidence obtained as a result of that stop must be suppressed.

Id. at 508. While I disagree with the Florida Supreme Court's interpretation of the plain meaning of that paragraph

of the statute, they are the ultimate authority on the scope and construction of their own state statutes. *United States v. Allen*, 27 M.J. 234, 238 (C.M.A. 1988).

In the case sub judice, Officer Jennewein testified that his probable cause for the stop was the appellant's turn without signaling. Officer Jennewein said there was moderate traffic on the street that night, including men cruising through the area in their cars looking for prostitutes. However, he could not say that any other vehicle was affected by the appellant's turn, including his own.

"The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)); *United States v. McCarthy*, 38 M.J. 398, 402 (C.M.A. 1993) (citing *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989) and *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)). The decision to stop a motorist is reasonable when a law enforcement officer has probable cause to believe that a traffic violation has occurred. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam). The actual motivation of a law enforcement officer who detains a motorist based on probable cause is irrelevant. *Whren v. United States*, 517 U.S. 806, 810-13 (1996).

> The rule articulated by the Supreme Court in *Whren* provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded.

United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998). *See also United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000); *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999).

In *Miller*, the accused drove his motor home through an intersection with his left turn signal on, without turning or changing lanes. A deputy sheriff stopped him for the purpose of issuing a warning citation for improper use of the turn signal pursuant to Tex. Transp. Code § 547.305(c) (Vernon Supp. 1997). During the stop, the accused consented to the warrantless search of his vehicle and the police found marijuana. The District Court denied defendant's motion to suppress the evidence, and he was convicted of possession of marijuana with intent to distribute. The Court of Appeals for the Fifth Circuit held that the lower court erred in admitting the marijuana into evidence because it found that flashing a turn signal without turning or changing lanes was not a violation of Texas law. As a result, there was no probable cause for the stop.

In *Lopez-Soto*, the accused was stopped by a San Diego police officer while driving a car that displayed license plates from Baja California, Mexico. The police officer conducted the stop because he mistakenly believed that Baja California required motorists to affix a visible registration sticker on the rear of the car. During the stop, the officer discovered 400 kilograms of marijuana in the car. The District Court denied defendant's motion to suppress the evidence and the accused entered a conditional plea of guilty to possession of the marijuana with the intent to distribute. In reversing the accused's conviction, the Court of Appeals for the 9th Circuit found that even though the defendant's vehicle had no valid registration sticker, the officer's mistaken understanding of the law did not provide an objectively reasonable basis for the stop.

In *Lopez-Valdez*, the accused was driving on a public highway in Texas near the Mexican border. Traveling in the

opposite direction, a Texas state trooper and a border patrol agent noticed her car had numerous passengers. They suspected that she was smuggling aliens. When the trooper looked in his rearview mirror, he saw the accused's brake lights come on and noticed a hole in the right taillight. The trooper decided to stop the accused because he believed that a broken taillight constituted a traffic infraction. After the stop, the trooper and agent discovered that most of the passengers were illegal aliens. The accused unsuccessfully sought to suppress this evidence and was convicted of willfully transporting illegal aliens. On appeal she argued that the trooper and agent lacked reasonable suspicion and probable cause for the stop. The Court of Appeals for the Fifth Circuit agreed with her and found that the presence of people in the car alone did not raise a reasonable suspicion of wrongdoing and that under Texas law a broken taillight did not justify a traffic stop. The court held that the stop of the accused's car also did not pass muster under the good faith exception to the exclusionary rule.

Like the other police officers in the cited cases, Officer Jennewein was mistaken about the law. As a result, the stop of the appellant was not objectively grounded in the law. The majority holds that despite this disconnect, the stop was still permissible based upon reasonable suspicion. I agree that a traffic stop may be based on reasonable suspicion. However, a stop under this theory must be based upon observations that the person stopped has committed, is committing, or is about to commit a crime. *See Lopez-Soto*, 205 F.3d at 1104 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)).

Officer Jennewein testified that shortly after midnight, he was on routine patrol for suspicious persons in a high crime area of Melbourne, Florida. He spotted the appellant's car parked in a dirt lot next to the home of a "convicted felon, crack user and small, middle dealer. He sells a lot of cocaine to the prostitutes." Officer Jennewein ran the license plate number and discovered the car was registered to an address

on Patrick Air Force Base (AFB), Florida. He examined the car and found Patrick AFB stickers indicating the owner was a noncommissioned officer. Officer Jennewein testified he parked across the street to see if anybody came to the car "so I could check, you know, it could have been a military spouse, their children, something like that, down here in the drug area. And it's not a kosher place for a member or a family member to be." (Before becoming a police officer for the city of Melbourne, Officer Jennewein had been an Air Force security policeman, stationed at Patrick AFB.) After waiting for 10 or 15 minutes for someone to return to the car, Officer Jennewein was called away to another area. Later, while sitting in his patrol car in a parking lot, some distance from where he originally noticed the appellant's car, watching people and cars, he saw the car drive by. Officer Jennewein pulled onto the street approximately 150 feet behind the appellant's vehicle. Almost simultaneously, the appellant made a right turn into an alley. Officer Jennewein initiated a traffic stop of the appellant because he failed to signal for the turn.

In my opinion, these facts are insufficient to justify a stop based upon reasonable suspicion that criminal activity was afoot. Initially, there was nothing distinctive about the car except that it was parked near public housing in a high crime area of the city. It was close to the home of a convicted felon who sold cocaine to prostitutes. Officer Jennewein learned that the car was registered to a noncommissioned officer stationed at Patrick AFB. However, he never saw anyone from the car enter or exit the felon's home. No individual was seen using or possessing cocaine or drinking alcohol before operating the car. In fact, but for Officer Jennewein's misunderstanding about traffic laws in the state of Florida, he never observed the car being operated in an unlawful manner.

Under the majority's theory, Officer Jennewein would have been justified stopping any car parked near the felon's house or operating in that high crime area early in the morning. I would hold that Officer Jennewein violated the Fourth Amendment when he stopped the appellant and that the evidence obtained as a result of the stop should have been suppressed by the judge. *See Wong Sun v. United States*, 371 U.S. at 484-85. Since all of the evidence concerning the drug offenses was obtained or derived from the stop, I would set aside and dismiss Charge I and its specifications.